The Warren Court's Missed Opportunities in Substantive Criminal Law

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The Warren Court was much less active and progressive in its treatment of substantive criminal law and sentencing issues than it was in the area of criminal procedure. The Warren Court's criminal law and sentencing decisions were also less activist and progressive than during other periods of the Court's history. Why did the Warren Court do so little in these areas, what more might it have done, and what difference would it make today if the Court had done more? This article examines the relatively small number of important Warren Court decisions relating to substantive criminal law and sentencing, and compares major decisions in these areas from earlier and later periods in order to identify specific topics that the Warren Court might have been expected to address. For reasons the article explores and that made sense at the time, it appears that the Warren Court didn't believe it was important to address these issues. If it had done so, the law in some areas—for instance, Eighth Amendment limitations on very long prison terms—would probably be much different today. But in other areas, such as limitations on the death penalty, this article contends that liberal Warren Court reform efforts might have been unsuccessful or even counter-productive.

The Warren Court handed down relatively few important decisions related to substantive criminal law and sentencing, and what it did decide was often not very progressive or favorable to defendants. In contrast, the Court's criminal procedure decisions were far more numerous,[1] and more consistently liberal.[2] Moreover, in earlier and later periods, when there were more moderate and conservative justices on the Court, it nevertheless rendered some important, and surprisingly "liberal," criminal law decisions. Thus, whether the comparison is with decisions of the Warren Court in other subject areas, or decisions on similar issues at other times in the Court's history, the Warren Court's silence on criminal law and sentencing issues resembles Sherlock Holmes's dog that didn't bark when it would have been expected to.[3]

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1 *See generally* William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 65–76 (1997). Stuntz asks why the Court throughout its history has regulated procedure more than substance and administrative structure (in particular, funding of defense counsel). *Id.* at 72. This article focuses on the Warren Court era, as to which Stuntz's question is particularly apt.

2 *But see* Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62–68 (Vincent Blasi ed., 1983).

3 SIR ARTHUR CONAN DOYLE, *Silver Blaze*, *in* GREAT STORIES 192, 211, 215 (John Dickson Carr

Why did the reformist Warren Court do so little with criminal law and sentencing issues? What more could it have done with the legal tools at its disposal? Would the Court have been successful in applying a liberal reform agenda to these issues? How would these areas of the law be different today, if the Court had been more active? What does the Warren Court's low profile on criminal law and sentencing issues tell us about that Court, and about the prospects for Supreme Court leadership? In short—why didn't the Warren Court bark louder on these issues, what can we deduce from this silence, and what difference did it make?

The remainder of this article is organized as follows. Part I summarizes the small number of important Warren Court decisions relating to substantive criminal law and sentencing. Part II examines major Supreme Court decisions in these areas from earlier and later periods, and Part III uses these cases to generate a short list of topics about which the Warren Court might have been expected to "bark," but didn't. Part IV discusses various theories that might explain why the Warren Court did so little in this area. The best explanation appears to be that, for reasons that made sense at the time, the Court simply didn't see these issues as very important, or believed they were or would be adequately addressed by on-going reform projects. In the final part I consider what difference the Warren Court's inaction may have made. I conclude that the law in some areas would probably be much different today if the Warren Court had taken a more active and progressive role. Those areas include Eighth Amendment limitations on very long prison terms, constitutional culpability requirements, and various applications of the reasonable doubt standard. But in other areas, including Eighth Amendment limitations on the death penalty, I argue that liberal Warren Court reform efforts might have been unsuccessful or even counter-productive.

I. THE WARREN COURT'S SUBSTANTIVE CRIMINAL LAW AND SENTENCING DECISIONS

The Warren Court's criminal law and sentencing watch dog didn't bark very loud or very often, but it wasn't completely silent. The following is a review of that Court's more important decisions on these topics.

A threshold question concerns the temporal definition of the "Warren Court" era. In his article in this symposium, Yale Kamisar argues that the Court's criminal procedure revolution began in the late Spring of 1961, when Justices Douglas and Brennan persuaded Justice Black to join what was at the time Justice Clark's plurality opinion in *Mapp v. Ohio*.[4] For the purposes of this discussion I will use a slightly broader definition, including all of the Court's October 1960 term (and ending, of course, with Justice Warren's retirement at the end of the October 1968 term).[5] The

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ed., 1959).

[4] Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 17 & n.41 (2005).

[5] These eight terms correspond to opinions in volumes 364 to 395 of the U.S. Reports. I have chosen to include all of the October 1960 term for several reasons: the roots of the *Mapp* decision may

following discussion excludes certain sub-topics, and gives only limited attention to others. I will not discuss Warren Court criminal law cases that involve constitutional requirements not unique to the criminal law context—in particular, cases interpreting the First Amendment,[6] Fourth Amendment,[7] Fifth Amendment,[8] Equal Protection Clause,[9] and "penumbral" privacy rights.[10] I will give only limited attention to Commerce Clause cases and cases interpreting provisions of federal criminal statutes that are unique to those statutes and/or the federal context. But a few of these cases will be discussed as illustrative of the problem of the ever-increasing scope of federal criminal jurisdiction and federal criminal laws—problems that began long before the Warren Court era.[11] The cases discussed below fall into four categories. For some of them I include a brief discussion of subcategories with no actual Warren Court cases; this is done to highlight the absence of cases on issues, which (as discussed in Part II) were addressed in earlier or later periods of the Court's history.

A. *Eighth Amendment and Sentencing Cases*

At the start of the Warren Court era one writer observed that "[f]ew constitutional guarantees of individual liberty have so often been relied upon, to so little avail, as has the eighth amendment."[12] At the end of the Warren Court era, this statement was still true. One of that Court's earliest and best known criminal law decisions (*Robinson v. California*[13]) was based on the Cruel and Unusual Punishment Clause, but the decision actually said very little about sentencing per se. Indeed, the

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have begun earlier that year, before the *Mapp* majority was forged; the personnel on the Court did not change during the October 1960 term; and it seems preferable to include all of that term or none of it. Of course, one could date the beginning much earlier, perhaps with the appointment of Justice Brennan in October of 1956 (352 U.S. x–xi), at which point there were four liberals (Warren, Black, Brennan, and Douglas) and one moderate (Clark). But there were very few major criminal justice decisions of any kind before *Mapp*, particularly in state cases (due to the absence of the selective incorporation theory, which received its first major criminal justice application in *Mapp*).

[6] *See, e.g.*, Street v. New York, 394 U.S. 576 (1969) (derogatory speech about the flag); Stanley v. Georgia, 394 U.S. 557 (1969) (pornography in the home).

[7] *See, e.g.*, See v. City of Seattle, 387 U.S. 541 (1967) (reversing defendant's conviction for refusing to permit warrantless inspection of his commercial warehouse).

[8] *See, e.g.*, Marchetti v. U.S., 390 U.S. 39 (1968) (incriminating gambling tax and registration obligations); Haynes v. United States, 390 U.S. 85 (1968) (incriminating firearms registration).

[9] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); McLaughlin v. Florida, 379 U.S. 184 (1964) (interracial cohabitation).

[10] Griswold v. Connecticut, 381 U.S. 479 (1965) (law forbidding use of contraceptives).

[11] *See infra* note 57–66.

[12] Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846, 846 (1961); *see also* Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964) (lamenting the "relative desuetude" of the Eighth Amendment, and concluding that the 1961 assertion quoted above has "abundant justification").

[13] *See infra* notes 15–18 and accompanying text.

Warren Court seemed to be almost completely uninterested in the substantive concern of the Eighth Amendment—the problem of excessive sentences.[14]

1. Status Crimes

In *Robinson v. California*,[15] the Court held that a statute making it a crime to "be addicted to the use of narcotics" violated the Eighth Amendment. The Court compared the statute to one criminalizing the status of being "mentally ill, or a leper, or . . . afflicted with a venereal disease;" such a law, the Court assumed, "would doubtless be universally thought to be an infliction of cruel and unusual punishment."[16] The California law in question allowed a custody sentence of up to ninety days, but the Court stated that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[17] The Court further assumed that "narcotic addiction is an illness . . . which may be contracted innocently or involuntarily."[18] This language, and the common understanding that drug addicts experience very strong compulsion to acquire and use their drugs, led some observers to predict that the Court might adopt a constitutionalized "voluntary act" requirement that would prohibit punishment of addicts for possession and sale of narcotics.[19]

However, this broad reading of *Robinson* was rejected in *Powell v. Texas*,[20] a case decided near the end of the Warren Court era. *Powell* upheld the conviction of a chronic alcoholic for the crime of being found drunk in public, rejecting the defendant's argument that he could not stop himself from getting drunk and then going out or remaining in public, and that punishing him for these acts amounted to punishing him for his disease of alcoholism. Justice Marshall's plurality opinion and the two concurring opinions emphasized that Powell was being punished not for a mere status or disease, or even the act of becoming drunk, but rather for the act of being or remaining in public (while drunk). None of these opinions appeared concerned with whether Mr. Powell really had the ability to keep himself from going out or remaining in public once he became drunk. Thus it appears that the Eighth Amendment limitation imposed in *Robinson* and *Powell* only prohibits punishment of

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[14] *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative To What?*, 89 MINN. L. REV. 571, 575 (2005) (noting that excessiveness is unifying element of Eighth Amendment Bail, Excessive Fines, and Cruel and Unusual Punishment Clauses).

[15] 370 U.S. 660 (1962).

[16] *Id.* at 666.

[17] *Id.* at 667.

[18] *Id.*

[19] *See* Stuntz, *supra* note 1, at 68 n.234 (citing post-*Robinson* commentaries: Michael R. Asimow, Comment, *Constitutional Law: Punishment for Narcotic Addiction Held Cruel and Unusual*, 51 CAL. L. REV. 219, 225–26 (1962), *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 54, 146 (1962)).

[20] 392 U.S. 514 (1968).

pure status or propensity, and does not impose a constitutionalized "voluntary act" standard.[21]

2. Non-Capital Penalties

Before and after the Warren Court era, the Court considered a number of cases challenging very long prison sentences under the Eighth Amendment Cruel and Unusual Punishment Clause (see Part II), but the Warren Court itself never ruled on this issue (nor did it issue any decisions interpreting the Excessive Fines Clause).[22] In the early 1960s the Court did hear a case, *Oyler v. Boles*,[23] challenging prosecutorial discretion in choosing which offenders to charge under a habitual offender law. In rejecting that challenge, the Court began by stating that the constitutionality of habitual offender laws "is no longer open to serious challenge."[24] As *Oyler* shows, the Court was not even interested in placing procedural limitations on the use of habitual offender laws. This was confirmed several years later in *Spencer v. Texas*,[25] a case in which the Court rejected a claim that inclusion of prior crimes in a habitual offender indictment, and the submission of all issues to the jury that determined guilt and sentencing, posed a high risk that the jury would misuse the prior-crimes evidence. The Court again noted that such recidivist laws had been previously upheld against claims of double jeopardy, ex post facto, cruel and unusual punishment, due process, equal protection, and privileges and immunities.[26] The Court concluded that juries can be trusted to follow instructions to not consider the prior crimes as to guilt or innocence of the present offense. [27]

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[21] One lower court has further suggested that certain statuses such as homelessness do not qualify for the *Robinson-Powell* rule. *See* Joyce v. San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994). *But see* Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992) (holding that *Robinson* prohibits arrest of homeless persons for basic activities of life (eating, sleeping, etc.) in public).

[22] The Warren Court did, however, impose a limitation on sentence severity under the Due Process Clause. *See* North Carolina v. Pearce, 395 U.S. 711, 725–26 (1969) (to ensure against vindictiveness for having successfully appealed his conviction, defendant may not receive a more severe sentence on remand unless trial court states reasons and provides factual basis on the record, showing identifiable conduct of defendant since original sentencing which justifies increased severity).

[23] 368 U.S. 448 (1962).

[24] *Id.* at 451. The Court cited *Moore v. Missouri*, 159 U.S. 673, 677 (1895), and *Graham v. West Virginia*, 224 U.S. 616, 631 (1912). Both of those cases dismissed cruel and unusual punishment claims without discussion, citing two prior cases. However, those prior cases also lacked any substantial discussion of these issues. *See In re* Kemmler, 136 U.S. 436 (1890) (electrocution); Howard v. North Carolina, 191 U.S. 126 (1903) (ten year sentence for conspiracy to defraud). Of course, all four cases were decided long before selective incorporation was adopted.

[25] 385 U.S. 554 (1967).

[26] *Id.* at 560.

[27] Compare the Court's holding one year later in *Bruton v. United States*, 391 U.S. 123 (1968) (unacceptable risk that juries will ignore instructions not to consider a co-defendant's confession implicating both defendants, when determining the defendant's guilt). *See also* Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) (reaffirming *Spencer* and distinguishing *Bruton*).

3. Capital Punishment

The Warren Court's silence on excessive prison terms was matched by its silence on death penalty issues—the Court never ruled on the substantive validity of capital punishment, even though in the early 1960s about fifty offenders were being executed every year.[28] Nor can the Court's unwillingness to consider substantive challenges easily be attributed to adoption of an "original meaning" theory (i.e., that the death penalty was widely used and deemed acceptable in the late eighteenth century); by the late 1950s the Court had already signaled that the Eighth Amendment's meaning should incorporate "evolving standards of decency."[29] Moreover, a number of substantive limitations on the use of the death penalty were imposed in the post-Warren Court era.[30] However, in contrast to its treatment of habitual offender laws, the Court did impose several procedural protections in death penalty cases.[31]

B. *Due Process Vagueness and Fair Notice Cases*

Due process requirements of specificity and fair notice to would-be offenders are "substantive" in the sense that they limit the scope and content of the criminal law. The Warren Court was relatively active in this area.

Void-for-vagueness cases. The Warren Court issued a number of rulings striking down state criminal statutes on vagueness grounds.[32] However, it does not appear that the decisions from this era added much to the vagueness doctrine, which the Court had been using for decades.[33]

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[28] *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 30 (1986) (reporting fifty-six, forty-two, and forty-seven executions in 1960, 1961, and 1962, respectively).

[29] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality). *See infra* text accompanying note 68.

[30] *See infra* notes 88–89 and accompanying text.

[31] *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968) (prosecution cannot exclude jurors who express general objections to or conscientious or religious scruples against infliction of the death penalty); United States v. Jackson, 390 U.S. 570, 581–83 (1968) (statute authorizing death penalty only if jury so recommends unconstitutionally burdens Fifth and Sixth Amendment rights to plead not guilty and demand a jury trial).

[32] *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965); Ashton v. Kentucky, 384 U.S. 195 (1965); Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

[33] *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451 (1939) (statute punished persons "known to be a member of any gang consisting of two or more persons"; the statute was struck down on due process vagueness grounds, not on the "status crime" theory applied in *Robinson v. California*, *supra* text accompanying note 15); Connally v. General Constr. Co., 269 U.S. 385 (1926) (state wage and hour law vague and violated due process). *See generally* WAYNE LAFAVE, CRIMINAL LAW § 2.3 (4th ed. 2003) (citing common law and nineteenth century cases); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (citing cases and commentary on the doctrine as early as the 1920s, and similar variously named doctrines going back to the common law; the author, "A.G.A.," is apparently Anthony G. Amsterdam, *see id.* at 66).

Other fair-notice cases. In several cases, the Warren Court held that conviction was barred by constitutional fair-notice requirements similar to those that underlie the void-for-vagueness doctrine. In *James v. United States*,[34] the Court overruled a prior decision favorable to the defendant, but held that this reinterpretation of the statute would only apply prospectively. In *Bouie v. City of Columbia*,[35] the Court held that the Due Process Clause prohibits a court from achieving by judicial construction (in that case, extension of the state trespass law) what the legislature is barred from doing by the Ex Post Facto Clause, at least where the court's new interpretation is "unexpected" in light of prior decisions.[36] Another variant of the "no-fair-notice" defense was recognized in *Cox v. Louisiana*,[37] where the Court invalidated a courthouse-picketing conviction of a defendant who had received permission from the sheriff and mayor to do the acts with which he was charged. Finally, some have argued that Justice Frankfurter's plurality opinion in *Poe v. Ullman*,[38] implicitly adopted and constitutionalized the civil law doctrine of desuetude, whereby long-unenforced laws are deemed to have been repealed by implication.[39]

C. *Conviction Standards Cases*

The requirement of proof beyond a reasonable doubt might be considered an issue of trial procedure, but it can also be viewed as a substantive right closely related

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[34] 366 U.S. 213, 221–22 (1961) (overruling prior case holding embezzled funds not includable in gross income, but dismissing indictment because statutory requirement of "willful" tax evasion could not be met in light of gloss placed on tax statute by the overruled case). For discussion of later cases based on statutory "willfulness" requirements, see *infra* text accompanying notes 146–48.

[35] 378 U.S. 347 (1964).

[36] *Id.* at 353–54. However, it appears that *Bouie* has been applied very narrowly. *See* Harold Krent, *Should* Bouie *Be Bouyed? Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 39 (1997) ("promise of *Bouie* has been largely illusory"; courts grant relief "only when the judicial change seems entirely arbitrary").

[37] 379 U.S. 559 (1965) (conviction under statute punishing picketing near courthouse violated Due Process Clause where defendant was in effect told by sheriff and mayor that he and other demonstrators could meet across street from courthouse), citing Raley v. Ohio, 360 U.S. 423 (1959) (Due Process Clause prevented conviction of persons for refusing to answer questions of a state investigating commission where they relied upon express or implied assurances of the commission that they had a privilege under state law to refuse to answer, though no such privilege was actually available to them). *Cf.* MODEL PENAL CODE § 2.04(3)(b) (1985), providing a limited "mistake of law" defense for defendants who establish that they acted in reasonable reliance on an "official statement" of the law by an officer with responsibility for enforcing that law. The Model Penal Code defense was cited (without discussion) by the *Cox* majority. *See* 379 U.S. at 569 n.3.

[38] 367 U.S. 497 (1961) (refusing to rule on challenge to unenforced statute limiting use of contraceptives). For a discussion of the pros and cons of a formal desuetude doctrine, see William Stuntz, *Substance, Process, and the Civil-Criminal Divide*, 7 J. CONTEMP. L. ISSUES 1, 34–38 (1996).

[39] *See* Alexander M. Bickel, *The Supreme Court 1960 Term, Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 58–64 (1961); *see also* Arthur N. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 415–16 (1964) (prosecution under long-unenforced statute violates constitutional requirements of fair notice).

to core criminal law issues. In a post-Warren Court case, In Re *Winship*, which held that the reasonable doubt standard is constitutionally required, the Court stated:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. [40]

Although *Winship* was a 1970 case (see further discussion in Part II), the Warren Court decided several cases that seemed to implicitly assume this constitutional requirement, as I will show in the rest of this section.

1. Statutory Presumption Cases

In *United States v. Romano*,[41] the Court reversed a conviction for the crime of "possession, custody and control" of an illegal still, where the jury had been instructed in accordance with a statute providing that the defendant's presence at the site of such a still "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury."[42] The Court relied on its earlier decision in *Tot v. United States*,[43] holding that a presumption violates Fifth and Fourteenth Amendment due process if there is no "rational connection" between the fact proved and the ultimate fact presumed, and the inference is "arbitrary" due to lack of connection between the two "in common experience."[44]

In *Romano*, the Court distinguished its recent decision in *United States v. Gainey*,[45] upholding another statutory presumption applicable to illegal stills. The Court in that case had found a sufficiently rational connection between the proved fact of unexplained presence at an illegal still and the crime of carrying on the business of a distiller. The latter crime was deemed much broader than the possession charge at issue in *Romano*, thus making the *Gainey* presumption more in accord with "common experience." Almost anyone present at the still could be said to be carrying on the business, whereas many such participants (for example, a delivery man) could not be

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[40] *In re* Winship, 397 U.S. 358, 364 (1970).

[41] 382 U.S. 136 (1965).

[42] *Id.* at 138.

[43] 319 U.S. 463 (1943) (due process violated by rule that possession of a firearm or ammunition by any person convicted of a crime of violence is presumptive evidence that he received it in interstate or foreign commerce after effective date of statute).

[44] *Id.* at 467–72 (citing earlier cases dating from 1910).

[45] 380 U.S. 63 (1965).

said to possess or control the still. Also, the jury in *Gainey* was specifically told that the statutory inference was not conclusive, that presence at the still was one circumstance to be considered among many, and that even if the jury found unexplained presence at the still, it could nonetheless acquit the defendant if it found that the Government had not proved his guilt beyond a reasonable doubt.[46]

One of the Warren Court's last decisions was another presumption case, *Leary v. United States*.[47] Citing the due process standards of *Tot*, *Gainey* and *Romano*, the Court invalidated a statute authorizing the jury to infer from defendant's possession of marihuana that defendant knew the marihuana was illegally brought into the United States. But the precise relationship between the Court's presumption rules and the reasonable doubt standard was left unclear. The Court suggested that a presumption would be valid if "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact."[48] However, the Court then immediately added a footnote that, since the presumption in question had been found unconstitutional under the latter standard, there was no need to reach the further question of whether a presumption must also satisfy the reasonable doubt standard where "proof of the crime charged or an essential element thereof" depends upon the presumption.[49] In the same footnote the Court cited a lower court case suggesting that the reasonable doubt standard is constitutionally required, and that presumptions must not be allowed to undercut the standard.

Although post-Warren Court cases confirmed the constitutional basis of the reasonable doubt standard and extended its application to at least some "sentencing factors," the precise relationship between so-called "permissive" presumptions and the reasonable doubt standard remains unclear. A strong argument can be made that some constitutionally valid permissive inferences undercut the reasonable doubt standard (see further discussion in Part II), but the Court has never spoken clearly on this issue.

2. Enhanced-Sentence Laws

In *Specht v. Patterson*,[50] the Court found that the Due Process Clause was violated where a statute allowed a sexual offense, which otherwise carried a ten-year maximum, to result in life imprisonment if the judge made certain findings at sentencing.[51] The Court stated that invocation of the enhanced-sentence procedure "means the making of a new charge leading to criminal punishment . . . not unlike . . .

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[46] *Id.* at 70.

[47] 395 U.S. 6 (1969).

[48] *Id.* at 36.

[49] *Id.* at 36 n.64.

[50] 386 U.S. 605 (1967).

[51] An indeterminate life term was authorized if the trial court "is of the opinion that any . . . person (convicted of specified sex offenses), if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." *Id.* at 607.

recidivist statutes where an habitual criminal issue is a 'distinct issue.'"[52] The Court held that before such an enhanced sentence could be imposed, the defendant was entitled to "reasonable notice and an opportunity to be heard" at a hearing where the defendant could be present with counsel, testify, present evidence, and have the opportunity to confront and cross-examine adverse witnesses.[53] The Court also stated that "there must be findings adequate to make meaningful any appeal that is allowed."[54] This case foreshadowed later decisions applying jury trial, reasonable doubt, and other procedural safeguards to factual determinations that increase the statutory maximum or presumptive-guidelines sentence.[55] However, it is remarkable that the Court in *Specht* did not mention the right to jury trial, let alone proof beyond a reasonable doubt. Perhaps this was because the Court wasn't sure an enhanced-sentence provision should be deemed fully equivalent to a separate, more serious crime. As discussed more fully below,[56] the Court's recent sentencing cases still have not resolved this fundamental ambiguity.

D. *Federal Criminal Jurisdiction and Criminal Law*

As noted earlier, this article will not attempt to identify and describe all of the Warren Court's cases relating to federal criminal law. A few illustrative cases will be briefly examined to illustrate the Warren Court's role in a problem which has been widely lamented—the extraordinarily broad and steadily-increasing scope of federal criminal jurisdiction and federal criminal statutes.[57] Actually, the Warren Court made only a modest contribution to this problem, but that Court also did little to address it and indeed probably never even saw it as a problem. Nor was this due to any great lull in congressional activity; the Warren Court era witnessed important new and expanded federal criminal laws.[58]

Federal jurisdiction. Broad federal criminal jurisdiction had long been based on an expansive reading of congressional power under the Commerce Clause, and the

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[52] *Id.* at 610 (quoting Graham v. West Virginia, 224 U.S. 616, 625 (1912)).

[53] *Id.* at 610.

[54] *Id.*

[55] *See infra* notes 119–21 and accompanying text.

[56] *See infra* text accompanying note 122.

[57] *See, e.g.*, William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001); Stuntz, *supra* note 1, at 57 n.191; American Bar Ass'n, Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law* 21 (1998).

[58] *See, e.g.*, 18 U.S.C. § 1952 (1961) (the "Travel Act"). However, by one measure, the number of new criminal laws enacted per year, Congress was somewhat less active in the 1960s than it was in earlier or later decades. *See* American Bar Ass'n, *The Federalization of Criminal Law*, *supra* note 57, at 7 (as of 1996, the percentage of criminal statutory sections enacted in preceding decades were: 1950–1960, 15%; 1960–1970, 10%; 1970–1980, 14%; 1980–1990, 15%; 1990–1996, 12%).

Warren Court continued and further expanded this reading. In a series of cases,[59] the Court upheld broad jurisdiction for civil remedies under the Civil Rights Act of 1964.

Federal criminal law. The Warren Court also continued the long-standing tradition of broadly construing the scope of federal criminal statutes. In *Callanan v. United States*,[60] the Court held that a defendant can be convicted of and receive consecutive (cumulative) sentences for conspiracy and the completed crime which was the object of the conspiracy. The Court reaffirmed statements in many prior cases that rejected "merger" of conspiracy and its object crime.[61] The *Callanan* Court also rejected the defendant's argument that, because the charged conspiracy and substantive crimes were both contained in the same section of the United States Code, this indicated a congressional intent to not punish commission of both offenses cumulatively. The four dissenting justices agreed with the defendant's argument, citing textual, historical, and jurisprudential reasons.[62]

Callanan was decided in 1961, prior to the watershed *Mapp* decision, and thus perhaps prior to the full emergence of the "real" Warren Court. But the Court's broad interpretation of federal criminal statutes continued until the end of the Warren Court era. For example, in *United States v. Nardello*,[63] decided in January 1969, the Court held that the meaning of "extortion" in the Travel Act is broader than common law extortion, and includes acts by private parties as well as public officials. The lower court in *Nardello* had accepted the defendants' argument that the federal statute left the definition of extortion to state law, and that in the state where the charged acts occurred (Pennsylvania), the crime of extortion could only be committed by a public official.[64] The Supreme Court unanimously rejected this argument, citing the broad purposes of the Travel Act to combat organized crime, and questioning why Congress would want the statute to apply differently in different states.[65] The District Court had cited legislative history indicating a consistent understanding that the Act would be applied differently from state to state.[66]

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[59] *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (Commerce Clause, interpreted under current conditions and including interstate noncommercial travel, supports public accommodations provisions of Civil Rights Act of 1964, even as to a "local" motel); Katzenbach v. McClung, 379 U.S. 294 (1964) (racial discrimination at restaurants where substantial portion of food served is from out of state has sufficient adverse effect on interstate commerce; particular restaurant need not be shown to have such an effect); Daniel v. Paul, 395 U.S. 298 (1969) (amusement park in center of state had effect on interstate commerce because some food, boats, a juke box, and probably some customers came from out of state).

[60] 364 U.S. 587 (1961).

[61] *See, e.g.*, Pinkerton v. United States, 328 U.S. 640, 643–44 (1946) (citing earlier cases).

[62] *Callanan*, 364 U.S. at 597 (Stewart, J., dissenting).

[63] 393 U.S. 286, 296 (1969).

[64] The decision below is reported as United States v. Burke, 278 F. Supp. 711 (E.D. Pa. 1968).

[65] *Nardello*, 393 U.S. at 290–94.

[66] *Burke*, 278 F. Supp. at 712.

II. WHAT MORE COULD THE COURT HAVE DONE? LIBERAL DECISIONS FROM EARLIER AND LATER PERIODS

The Warren Court's infrequent and relatively soft barking on criminal law and sentencing issues is curious not only in light of the Court's liberal-activist approach in other areas of law, but also in comparison to the Court's numerous "liberal" criminal law and sentencing decisions before and after the Warren Court era. To facilitate these temporal comparisons, the following summary of earlier and later cases focuses on the same four topical areas discussed in Part I; likewise, it excludes certain sub-topics, and gives only limited attention to others.[67]

A. *Eighth Amendment and Sentencing Cases*

1. General Eighth Amendment Standards

In the 1958 case of *Trop v. Dulles*,[68] a four-justice plurality applied the Eighth Amendment Cruel and Unusual Punishment Clause to the penalty of divestment of citizenship. The Court had not used the Amendment to invalidate a punishment for almost fifty years,[69] and had never before suggested that a completely intangible sanction could violate the Amendment. The plurality in *Trop* made clear its intention to apply a "dynamic"[70] interpretative approach, noting that "the words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[71]

As we have seen, the Warren Court's sole Eighth Amendment decision was *Robinson v. California*, a case that involved incarceration for a status.[72] Capital punishment decisions (discussed later in this article) dominated the decades after the Warren Court era, but there were also a number of cases applying the Eighth Amendment to lengthy prison terms and to civil and criminal forfeitures, as the next section shows.

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[67] *See supra* notes 6–11 and accompanying text. I discuss Commerce Clause cases and most cases interpreting federal criminal statutes only as illustrative of the Court's occasional willingness to limit the scope of federal criminal jurisdiction and federal criminal laws.

[68] 356 U.S. 86 (1958).

[69] *See* Weems v. United States, 217 U.S. 349, 367 (1910) (invalidating Philippine penalty of *cadena temporal* in part because of its unusual accessory penalties (relative to common law traditions), but also stating that Eighth Amendment requires punishments to be "graduated and proportioned to offense").

[70] *Cf.* WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994).

[71] *Trop*, 356 U.S. at 100–01.

[72] *See supra* notes 15–19 and accompanying text.

2. Non-Capital Penalties

In a series of cases beginning in 1980, the Court considered what limits the Eighth Amendment places on very long prison sentences.[73] In only one of these six cases, *Solem v. Helm*,[74] did the Court rule in favor of the defendant; the other five cases, like *Solem*, were all five-to-four decisions in form or substance.[75] In *Solem* the defendant was sentenced to life without parole under a South Dakota recidivist statute. His prior convictions were for burglary, obtaining money under false pretenses, grand larceny, and felony (third offense) drunk driving, and his most recent crime was issuing a no-account check for $100.[76] The majority opinion in *Solem* traced the history of proportionality rules back to Magna Carta provisions requiring fines to be graded according to offense seriousness, and concluded that the proportionality principle was well established in Anglo-American law and in the Court's prior cases. The Court noted that neither the history nor the text of the Eighth Amendment suggests any distinction between types of punishments; all of the Amendment's clauses forbid excessiveness, and "[i]t would be anomalous indeed" if fines and the death penalty were subject to proportionality analysis, but the "intermediate punishment of imprisonment" was not.[77]

The *Solem* Court conceded that reviewing courts should grant substantial deference to legislative judgments, and suggested the following "objective factors" to guide such review: 1) the gravity of the offense and the harshness of the penalty; 2) a comparison of sentences imposed for other crimes in the same jurisdiction; and 3) a comparison of sentences imposed for the same crime in other jurisdictions.[78] However, in subsequent cases these standards have been interpreted narrowly, casting doubt on whether the current Court would even reach the same result on the facts of *Solem*.[79]

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[73] *See generally* Frase, *supra* note 14.

[74] 463 U.S. 277 (1983). *Solem* is discussed in Frase, *supra* note 14, at 579, 638.

[75] Frase, *supra* note 14, at 577.

[76] *Solem*, 463 U.S. at 279–81.

[77] *Id.* at 289.

[78] *Id.* at 290–92.

[79] *See* Frase, *supra* note 14, at 581–88. Several justices have rejected any Eighth Amendment proportionality limits on prison terms, and shifting pluralities have ruled that the second and third *Solem* factors need only be considered "in the rare case in which a threshold comparison of the crime committed and the sentence imposed [*Solem* factor one] leads to an inference of gross disproportionality." Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J.); Ewing v. California, 538 U.S. 11, 23–24, 30 (2003) (O'Connor, J.). In *Harmelin*, the Court upheld a mandatory life-without-parole sentence for a first-time drug offender charged with possessing a large quantity of cocaine. In *Ewing*, the Court approved a mandatory 25-years-to-life sentence for a recidivist charged with stealing three golf clubs. *See also* Lockyer v. Andrade, 538 U.S. 3 (2003) (upholding a 50-years-to-life sentence for a non-violent recidivist charged with shoplifting nine videotapes, but not directly ruling on the Eighth Amendment issue).

In several cases decided in the 1990s the Court applied the Excessive Fines Clause of the Eighth Amendment to criminal and civil forfeitures.[80] The Court also used the Due Process Clauses to impose proportionality limits on punitive damages awards.[81] The Court, before and after the Warren Court era, occasionally limited sentencing severity in the case of offenders convicted of multiple crimes, relying on the presumed intent of Congress not to punish the same criminal transaction more than once. For example, in *Prince v. United States*,[82] the Court found no evidence that Congress intended to permit consecutive sentences for bank robbery and the lesser included crime of entering a bank with intent to commit a felony.[83]

3. Capital Punishment

Shortly after the end of the Warren Court era, the Court began to consider a number of substantive and procedural challenges to the death penalty. In the 1971 case of *McGautha v. California*,[84] the Court rejected a due process attack on death penalty statutes that allowed juries to make life and death decisions with no standards or guidance. But one year later, in *Furman v. Georgia*,[85] five justices (each writing a separate opinion) struck down all death penalty laws in the United States. Justices Brennan and Marshall argued that the death penalty violates the Eighth Amendment under any circumstances because it serves no legitimate deterrent or retributive purpose and also violates the "evolving standards of decency" criterion announced in *Trop v. Dulles*.[86] Justices Douglas, Stewart, and White each felt that the death penalty only violated the Eighth Amendment as applied, in light of the unpredictable and

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[80] *See* Alexander v. United States, 509 U.S. 544 (1993) (finding that in personam criminal forfeiture of defendant's entire business might constitute an excessive fine; case remanded for determination of that issue); Austin v. United States, 509 U.S. 602 (1993) (remanding to determine whether in rem civil forfeiture of convicted drug dealer's mobile home and auto body shop was an excessive fine); United States v. Bajakajian, 524 U.S. 321 (1999) (concluding that in personam criminal forfeiture of $357,144 in cash acquired legally but not reported before trying to take it out of the country violated the Excessive Fines Clause).

[81] *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); BMW of N. Am., Inc. v. Gore 517 U.S. 559 (1996); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). Punitive damages are not covered by the Excessive Fines Clause. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989).

[82] 352 U.S. 322 (1957). For a later example, see Simpson v. United States, 435 U.S. 6 (1978) (finding that Congress did not intend a conviction of bank robbery to also result in a separate conviction for using a firearm to commit a felony).

[83] The Court made clear that the *Prince* doctrine was based on legislative intent in *Missouri v. Hunter*, 459 U.S. 359 (1983), holding that the Double Jeopardy Clause does not prohibit multiple punishments imposed in a single trial for two crimes which are "same offense" (and thus could not be serially prosecuted), so long as the legislature has specifically authorized cumulative punishment.

[84] 402 U.S. 183 (1971).

[85] 408 U.S. 238 (1972).

[86] *See supra* notes 29, 68–71 and accompanying text.

racially discriminatory nature of standardless jury sentencing. It should be noted that all five of the justices who found the nation's death penalty laws unconstitutional were sitting in the last year of the Warren Court (along with liberal Justices Warren, Fortas, and Black).

In the wake of *Furman*, about three-quarters of the states enacted new death penalty laws and a number of guided-discretion statutes were upheld by the Court in 1976.[87] But one year later, the Court held that the Eighth Amendment barred the death penalty for rape of an adult victim,[88] and subsequent decisions extended this substantive ban to include certain other defendants.[89]

B. *Due Process Vagueness and Fair Notice Cases*

The Warren Court's void-for-vagueness decisions built on a line of cases going back many decades (see Part I), and the Court continued to strike down vague laws in the post-Warren Court era.[90] But apart from the vagueness doctrine, the Court in earlier and later years almost never struck down criminal laws on fair-notice grounds. One notable exception is *Lambert v. California*,[91] in which the Court held that a municipal felon registration law violated the Due Process Clause. The Court noted that Ms. Lambert's conduct was "wholly passive—mere failure to register," and that unlike other registration laws and regulatory crimes of omission, the violation of this law was "unaccompanied by any activity whatsoever" other than mere presence in the city of Los Angeles.[92] The Court stated that "[e]ngrained in our concept of due process is the requirement of notice," and suggested, quoting Oliver Wendell Holmes, that conduct should not be punished if it "would not be blameworthy in the average member of the community."[93] Accordingly, the Court held that Ms. Lambert could not constitutionally be convicted under the felon registration law absent proof of knowledge of the duty to register "or the probability of such knowledge. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."[94] Justice Frankfurter dissented,

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[87] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976). Post-*Furman* mandatory death penalties were invalidated in Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Sumner v. Shuman, 483 U.S. 66 (1987).

[88] Coker v. Georgia, 433 U.S. 584 (1977).

[89] *See* Enmund v. Florida, 458 U.S. 782, 798–801 (1982) (felony murder accomplices who do not kill, intend to kill, or contemplate that lethal force will be used by a co-felon); Atkins v. Virginia, 536 U.S. 304 (2002) (mentally retarded offenders); Roper v. Simmons, 125 S. Ct. 1183 (2005) (offenders under eighteen years of age at the time of crime); *see also* Thompson v. Oklahoma, 487 U.S. 815, 822–23, 834–37 (1988) (offender who was fifteen at time of crime).

[90] *See, e.g.*, Chicago v. Morales, 527 U.S. 41 (1999).

[91] 355 U.S. 225 (1957).

[92] *Id.* at 228–29.

[93] *Id.*

[94] *Id.* at 229–30.

arguing that a broad reading of the Court's holding would invalidate numerous state and federal laws, but predicting that *Lambert* would prove to be "an isolated deviation from the strong current of precedents—a derelict on the waters of the law."[95] Frankfurter's prediction proved to be correct.[96]

C. *Conviction Standards Cases*

1. Constitutional Status of the Reasonable Doubt Standard

Because the requirement of proof beyond a reasonable doubt was so well established in state and federal courts, it was only in 1970, in the juvenile delinquency case of In Re *Winship*,[97] that the Court finally had occasion to confirm that this standard of proof is constitutionally required. The Court noted that this conclusion had long been assumed,[98] and concluded that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[99]

2. Limitations on Inferences and Presumptions

Curiously, the Court in *Winship* did not cite any of its previous decisions (*Tot*, *Gainey*, *Romano*, *Leary*),[100] placing due process limits on the use of presumptions, thus again raising questions about the relationship between presumption rules and the reasonable doubt standard. Shortly after *Winship* the Court decided *Turner v. United States*,[101] seeming to apply a reasonable doubt standard to presumptions. Together, *Winship* and *Turner* seemed to supersede the more-likely-than-not test suggested in *Leary*, the last of the Warren Court presumption cases. Moreover, subsequent cases striking down conclusive and rebuttable presumptions have expressly stated that such evidentiary devices must not violate the *Winship* requirement to prove each element beyond a reasonable doubt.[102] But when the inference is deemed to be "permissive" rather than conclusive or rebuttable, the Court has seemingly not insisted on strict

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[95] *Id.* at 232.

[96] *See, e.g.*, Texaco Inc. v. Short, 454 U.S. 516, 537 n.33 (1982).

[97] 397 U.S. 358 (1970).

[98] "Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *Id.* at 362 (citing cases as early as 1881).

[99] *Id.* at 364.

[100] *See supra*, notes 41–49 and accompanying text.

[101] 396 U.S. 398, 417–18, 422–24 (1970) (as to heroin counts, instructions on inference did not violate right to be convicted only on a finding of guilt beyond a reasonable doubt, but did violate that right as to cocaine counts).

[102] Sandstrom v. Montana, 442 U.S. 510, 512 (1979) (conclusive presumption); Francis v. Franklin, 471 U.S. 307, 309 (1985) (rebuttable presumption).

application of the reasonable doubt standard. In *Ulster County Court v. Allen*,[103] the Court defined a permissive inference or presumption as one which "allows—but does not require—the trier of fact to infer the elemental fact from [the proven fact(s)] and which places no burden of any kind on the defendant."[104] The Court also stated that inferences and presumptions "must not undermine the factfinder's responsibility . . . to find the ultimate facts beyond a reasonable doubt."[105] But the *Allen* Court held that the use of such permissive inferences only threatens the reasonable doubt standard

> if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.[106]

Read broadly, such a "rational basis" criterion (and the bland assumption that the jury is always a "rational factfinder") could seriously undermine the reasonable doubt standard, especially if the jury is told that the "law" deems the proven fact "sufficient" evidence of the elemental fact.[107] A narrow reading of *Allen* would require (as may have been true on the facts in that case) that the jury must be carefully instructed on its authority to refuse to draw the inference, its duty to consider all the circumstances, and its ultimate responsibility to find all elements of the charge beyond a reasonable doubt.[108]

3. Burden of Proof as to Affirmative Defenses

The reasonable doubt principles of *Winship* also underlie the Court's 1975 decision in *Mullaney v. Wilbur*,[109] holding that a Maine defendant charged with murder could not be required to prove his heat-of-passion defense by a preponderance of the evidence. However, the scope of this ruling was substantially limited two years later, in *Patterson v. New York*,[110] which upheld placing the burden of proof on the defendant to prove a broader version of the heat-of-passion defense. According to the *Patterson* Court, the difference between the Maine and New York homicide laws was that in Maine malice aforethought was an essential element of murder, which was conclusively presumed unless the defendant proved he acted in the heat of passion,

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[103] 442 U.S. 140 (1979).

[104] *Id.* at 157.

[105] 442 U.S. at 156 (citing *Winship*, 397 U.S. at 364, and *Mullaney*, 421 U.S. at 702–03 n.31).

[106] 442 U.S. at 157.

[107] *Cf.* MODEL PENAL CODE § 1.12(5)(b) (similar "sufficient evidence" instruction).

[108] *See* WAYNE LAFAVE, CRIMINAL LAW § 3.4(b) (4th ed. 2003).

[109] 421 U.S. 684 (1975).

[110] 432 U.S. 197 (1977).

whereas under New York law Patterson's heat-of-passion defense did not negate any necessary element of the crime of murder.[111] However, as pointed out by the *Patterson* dissenters, the Court in *Mullaney* had explicitly rejected that reading of the Maine homicide law,[112] and seemed to base its ruling on the broader grounds that the presence (or absence) of any factor that makes a substantial difference in punishment severity and stigma must be proven (or disproven) by the prosecution beyond a reasonable doubt.[113] Otherwise, the *Mullaney* Court reasoned, legislatures could too easily evade the requirements of *Winship* by simply redefining crimes so that most grading factors are stated as affirmative defenses rather than elements.[114]

The *Patterson* Court responded to this concern by stating that "there are obviously constitutional limits beyond which the States may not go" in redefining crimes in this manner.[115] But it was unclear in 1977, and remains unclear today, what those limits are. Justice Powell, dissenting in *Patterson*, argued that burden-shifting should not be permitted "if the factor at issue makes a substantial difference in punishment and stigma," and "historically has held that level of importance."[116] Subsequent cases have confirmed both that defendants can be required to prove "true" affirmative defenses that do not formally negate a required element,[117] and that states have very broad power to redefine offense elements so that affirmative defenses are no longer logically relevant to any required element.[118]

4. Proof Standards for Factors Permitting Enhanced Sentencing

Beginning in the late 1990s, the Court relied on the reasonable doubt standard (as well as jury trial and other trial-procedure rights) in a series of cases increasing the procedural requirements for enhanced sentencing. In *Jones v. United States*,[119] the Court construed aggravating factors in a federal carjacking statute as crime elements, in order to avoid serious constitutional questions under *Winship* and *Mullaney*. In *Apprendi v. New Jersey*,[120] the Court reached the constitutional questions it had ducked in *Jones*, and held that "other than the fact of a prior conviction, any fact that

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[111] *Id.* at 212–16.

[112] *Mullaney*, 421 U.S. at 687–91.

[113] *Id.* at 697–700.

[114] *Id.* at 698–99.

[115] 432 U.S. at 210.

[116] *Id.* at 226.

[117] Martin v. Ohio, 480 U.S. 228 (1986) (holding that shifting proof of self defense to defendant does not violate the Due Process Clause).

[118] *Cf.* Montana v. Egelhoff, 518 U.S 37, 56 (1996) (Ginsburg, J., concurring) (arguing that Court's decision upholding state law making intoxication evidence inadmissible makes sense if the state has permissibly redefined the elements of the crime).

[119] 526 U.S. 227 (1999).

[120] 530 U.S. 466, 490 (2000); *see also* Ring v. Arizona, 536 U.S. 584 (2002) (applying *Apprendi* to facts making an offender eligible for the death penalty).

increases the penalty for a crime beyond the prescribed statutory maximum" must be submitted to the jury and proved beyond a reasonable doubt. In *Blakely v. Washington*,[121] the Court held that in a legally binding sentencing guidelines regime the recommended guidelines sentence is the "statutory maximum" for *Apprendi* purposes. Thus, any sentence more severe than that recommendation can only be imposed if the defendant admits or the jury finds facts which justify an enhanced sentence. As of this writing (August 2005), it remains unclear whether *Apprendi-Blakely* factors are crime elements for all purposes (the problem first raised in *Specht v. Patterson* in 1967).[122] Nor is it clear whether legislatures may avoid all *Apprendi-Blakely* problems by simply raising the statutory or guidelines maximum and recasting all sentence-enhancement factors as mitigators (the problem posed by *Patterson v. New York*).[123]

D. *Federal Criminal Jurisdiction and Criminal Law*

In the years before and after the Warren Court era the Court's decisions in federal criminal cases usually expanded the scope of federal criminal jurisdiction and/or the scope of liability under federal criminal statutes. But sometimes the Court discovered limits to federal power in the criminal area.

1. Federal Jurisdiction

In *United States v. Lopez*,[124] the Court finally met a federal criminal jurisdiction claim it couldn't accept. The statute in *Lopez* made it a federal crime to possess a firearm in a place which the defendant knows or should know to be a school zone. Finding that the act neither regulated commercial activity nor required the gun possession to be connected in any way to interstate commerce, the Court concluded that the act exceeded congressional authority under the Commerce Clause. Five years later the Court followed *Lopez* in *United States v. Morrison*,[125] striking down as a violation of the Commerce Clause the civil remedy provisions of the Violence Against Women Act[126] because gender-motivated crimes of violence are not economic activity and the Act contained no case-specific finding of a jurisdictional element. It does not appear, however, that *Lopez* and *Morrison* will result in a substantial overall contraction of federal criminal jurisdiction.[127]

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[121] 124 S. Ct. 2531, 2538 (2004); *see also* United States v. Booker, 125 S. Ct. 738, 769 (2005) (holding that the Federal Sentencing Guidelines are subject to the *Blakely* rule).

[122] *See supra* notes 50–56 and accompanying text.

[123] *See supra* notes 110–11, 115–16 and accompanying text.

[124] 514 U.S. 549 (1995).

[125] 529 U.S. 598 (2000) (holding that 42 U.S.C. § 13981(b), part of the Violence Against Women Act of 1994, violates the Commerce Clause).

[126] 42 U.S.C. § 13981(b) (1994).

[127] In *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), the Court upheld congressional power to broadly

2. Federal Criminal Law

In the post-Warren-Court years the Court occasionally construed federal criminal statutes to require an additional showing of interstate activity. In *Rewis v. United States*,[128] the Court applied the rule of lenity and held that under the Travel Act the defendants who offered gambling services, and not just their customers, must have crossed state lines.[129] Later that year, in *United States v. Bass*,[130] a federal firearm possession statute was construed to require a nexus to interstate commerce for all ways of violating the statute.[131] The Court found that the statute as written was ambiguous, and that without a clear statement Congress should not be deemed to intend significant change in the federal-state balance.[132] A few years later, in *United States v. Maze*,[133] the Court again held, as it had in prior cases,[134] that in order to meet the mailing requirement of the federal mail fraud statute the defendant's use of mails must be in furtherance of the scheme.[135]

Supreme Court cases before and after the Warren Court era (but not during that era) sometimes read mens rea requirements into federal criminal statutes or recognized mistake defenses. In a 1952 case, *Morrissette v. United States*,[136] the Court held that a larceny-type statute would be presumed to carry over the common law larceny element of intent to steal another's property (negated, in *Morrissette*, by the defendant's belief that the property he took had been abandoned), unless Congress made clear that it wished to eliminate the intent requirement.[137] The Court distinguished various "public welfare offenses," where in prior cases the Court had dispensed with traditional intent requirements, because such crimes have no common law pedigree and tradition.[138] Although the Court's implicit "common-law-crime"

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prohibit marijuana production and possession, even where state law allows these activities for medical purposes. *Accord* United States. v. Bell, 70 F.3d 495, 497 (7th Cir. 1995) (*Lopez* challenges "almost invariably . . . fail"). Moreover, Congress amended the school zone law to require a case-specific jurisdictional finding, 18 U.S.C. § 922(q)(2)(A) (1990), and several courts have upheld the amended law. *See, e.g.*, United States v. Danks, 221 F.3d 1037, 1038–39 (8th Cir. 1999).

[128] 401 U.S. 808 (1971).

[129] *Id.* at 811–12.

[130] 404 U.S. 336 (1971).

[131] *See id.* at 347. The Court also applied the rule of lenity, citing *Rewis*, and several cases from the 1950s. *Id.* The Court of Appeals had expressed concern that the statute might be unconstitutional if no connection with interstate commerce had to be demonstrated in individual cases. *Id.* at 338. However, the Supreme Court did not reach this question. *Id.* at 339 n.4.

[132] *Id.* at 349.

[133] 414 U.S. 395 (1974).

[134] *See, e.g.*, Badders v. United States, 240 U.S. 391 (1916); Kann v. United States, 323 U.S. 88 (1944); Pereira v. United States, 347 U.S. 1 (1954); Parr v. United States, 363 U.S. 370 (1960).

[135] 414 U.S. at 405.

[136] 342 U.S. 246 (1952).

[137] *Id.* at 263.

[138] *Id.* at 252–56.

criterion is not always easily applied, it is nevertheless useful as a rule of presumed legislative intent. Twenty-five years later, in *United States v. United States Gypsum Company*,[139] the Court went further, stating that crimes with no intent element have a "generally disfavored status," and holding that a criminal anti-trust violation requires a showing that the defendant at least acted knowingly.[140] Justice Thomas cited *U.S. Gypsum* in a 1994 case, *Staples v. United States*,[141] holding that a statute prohibiting possession of an unregistered machine gun required proof, as an element of the crime, that the defendant knew the gun could fire automatically.[142]

In the post-Warren Court era the Court occasionally even recognized a mistake of law defense. In a 1985 case, *Liparota v. United States*,[143] the Court held that criminal prosecutions under the federal food stamp program required proof that the defendant knew his actions were unauthorized or illegal.[144] Without this requirement the statute would "criminalize a broad range of apparently innocent conduct."[145] Similar concerns with overbreadth and lack of fair notice have led the Court to interpret the requirement of "willfulness" in other complex federal statutes to mean that the defendant must be shown to have known he was acting illegally.[146] For example, in *Cheek v. United States*[147] the Court held that an honest belief that wages were not income for purposes of the federal income tax law would constitute a defense to tax evasion and failure to file.[148]

III. WHAT ELSE COULD THE WARREN COURT HAVE DONE?

What more could the Warren Court have done, with the tools at its disposal, to try to improve criminal law and sentencing in federal and state courts? In particular, what might a liberal, activist Court have been expected to do? The more-or-less "liberal" cases decided in the pre- and post-Warren Court eras, summarized in Part II

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[139] 438 U.S. 422 (1978).

[140] *Id.* at 437–38 and 443–46.

[141] 511 U.S. 600 (1994).

[142] *Id.* at 619. Justice Thomas also cited *Morrissette*, *supra* text accompanying note 136, and *Liparota*, *infra* text accompanying note 143, and distinguished *United States v. Freed*, 401 U.S. 601 (1971) (holding that knowledge that hand grenades are unregistered is not a required element of possession or conspiracy to possess).

[143] 471 U.S. 419.

[144] *Id.* at 434.

[145] *Id.* at 426. The Court also based its decision on the rule of lenity, citing *Rewis*.

[146] *See, e.g.*, Cheek v. United States, 498 U.S. 192 (1991) (tax evasion and failure to file); Ratzlaff v. United States, 510 U.S. 135 (1994) ("structuring" of currency transactions). The holding in *Ratzlaff* was subsequently overruled by statute, 31 U.S.C.A. § 5324(c) (2003).

[147] 498 U.S. 192 (1991).

[148] *Id.* at 201–04. The defense recognized in *Cheek* does not include the belief that the tax law is unconstitutional. *See id.* at 204–06.

above, can be used to generate a short list of topics that could, and perhaps should, have caused the Warren Court dog to bark.

A. *Eighth Amendment and Other Limits on Severe Sentences*

By the early 1960s the Court had seemingly rejected a static, original-meaning interpretation of the Eighth Amendment (*Trop v. Dulles*, 1958), and had used the Cruel and Unusual Punishment Clause to strike down a sentence involving divestment of citizenship (*Trop*) and punishment for the status of being addicted to narcotics (*Robinson v. California*, 1962). It would have been a natural extension of these cases (and by appropriate hints, litigants could have been encouraged to seek such extensions) for the Court to consider the substantive validity of extreme penalties—capital punishment as applied to certain offenders; very lengthy prison terms for property offenders—as the Court eventually did in *Furman* (1972), *Coker* (1977), and *Solem v. Helm* (1982).[149] The Court would have needed to develop a theory of what makes a punishment unconstitutionally "excessive" under the Eighth Amendment, but this would not have been difficult. As I have argued elsewhere,[150] the Court's cases under the Eighth Amendment and in many other areas of constitutional law have recognized at least three constitutional disproportionality standards. One standard (found in post-Warren Court cases dealing with capital punishment, forfeitures, and punitive damages) is based on blameworthiness and a constitutionalized version of the sentencing philosophy of "limiting retributivism." The other two standards (found in numerous cases across many areas of law, including many from the Warren Court era), are based on utilitarian theory: first, the costs or burdens of public measures should not greatly exceed the likely benefits of those measures (what I have referred to as "ends proportionality"); second, such measures should not be much more costly or burdensome than equally effective alternative measures available to achieve the same purposes ("means proportionality").

The Court could also have attacked excessive sentences by building on cases like *Prince* (1957) and making explicit that constitutional principles of double jeopardy limit cumulative punishment as well as serial prosecution for the "same offense," the argument that a more conservative Court rejected in *Missouri v. Hunter* (1983). The Warren Court could also have limited severe sentences by developing stricter conviction standards and applying these standards to enhanced-sentence statutes, building on its decision in *Specht v. Patterson* (1967). The latter approach is discussed in Section C, below.

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[149] Attacking severe monetary penalties under the Excessive Fines Clause, which the Court only began to do in the 1990s, would perhaps have been harder in the 1960s, when criminal fines were infrequently used, and before the widespread use of severe civil and criminal forfeitures.

[150] *See generally* Frase, *supra* note 14; *see also* Stuntz, *supra* note 1, at 65–69 (discussing proportionality limits that the Court could have tried to impose on substantive criminal law).

B. *Due Process Vagueness and Fair Notice*

By 1965, the Court had begun to develop a doctrine of constitutionally protected minimum required criminal culpability.[151] This doctrine was founded on the standard void-for-vagueness doctrine buttressed by fair-notice cases like *James* (1961), *Bouie* (1964), and *Cox* (1965).[152] On that foundation, the Court constructed a second-level theory of minimum required culpability by holding that defendants could not be punished for status (*Robinson v. California*) or for a crime that required an action that no one would have reason to expect would be required (*Lambert*).

These tentative forays into the thicket of culpability could have led the Court to think more deeply about the extent to which blameworthiness is required when the State seeks to impose criminal punishment. In so doing, the Court might have anticipated, and produced limited constitutionalized versions of, its later rulings interpreting federal criminal laws to avoid strict liability (*U.S. Gypsum*, 1978; *Staples*, 1994) and recognizing some mistake of law defenses (*Liparota*, 1985; *Cheek*, 1991).

C. *Conviction Standards*

In the statutory presumption cases—*Gainey* and *Romano* (1965); *Leary* (1969)—the Warren Court could have explicitly held that the reasonable doubt standard is constitutionally required, as the Court finally did in *Winship* in 1970, and could have used that standard to more strictly control the use of inferences and presumptions. An earlier recognition of the *Winship* principle could also have led the Warren Court to begin developing constitutional rules for determining what kinds of crime elements a legislature can redefine as affirmative defenses, perhaps along the lines suggested by the Court's actual opinion in *Mullaney* (1975) (as opposed to the Court's narrow reinterpretation of the *Mullaney* opinion in *Patterson* in 1977).[153] And if the Warren Court had recognized the *Winship* principle it could also, drawing on its opinion in *Specht v. Patterson* (1967), have begun to think—long before *Apprendi* (2000)—about how to distinguish between crime elements and "sentencing factors."[154]

D. *Federal Criminal Jurisdiction and Criminal Law*

Instead of continuing to expand federal criminal jurisdiction under a very broad reading of the Commerce Clause, the Warren Court could have used any number of

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[151] A similar argument is made by Stuntz, *supra* note 1, at 65–69.

[152] These cases are discussed *supra*, in text accompanying notes 34–37.

[153] *See supra* text accompanying notes 109–18.

[154] Scholars were aware of this issue at least by 1970. *See* LOUIS B. SCHWARTZ, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A PROPOSED FEDERAL CRIMINAL CODE : PROGRESS AND ISSUES xlix (1970) (recognizing but not resolving issue of proof standards and procedures for sentence-enhancement facts).

federal criminal statutes to anticipate the Court's later rulings in *Lopez* (1995) and *Morrison* (2000). Or the Court could have developed separate theories for criminal and non-criminal federal jurisdiction, holding very broad federal power appropriate to regulation of a national economic market, but imposing greater limits on federal criminal law enforcement power (perhaps tied to a constitutionalized standard of need for federal intervention and "substantial federal interest"[155]), in view of the strong and well-developed state interests in criminal justice.

As for federal criminal law itself, it was clear at least at the end of the Warren Court era, and probably throughout that era, that federal criminal law was in very poor shape. Two 1970 commentaries described federal criminal law as a "hodge-podge" or "chaos" that included many topics that had never been put in statutory form (e.g., self defense, use of force in law enforcement, insanity, entrapment, conspiracy, and consecutive sentencing).[156] Federal mens rea concepts were also very diverse and poorly defined.[157] At least in the many areas where statutory provisions were lacking or ambiguous, the Warren Court could have sought to develop a more coherent federal criminal law (and provide a better example to the states) as a matter of federal common law.

IV. WHY THE WARREN COURT DOG DIDN'T BARK

So why didn't the Warren Court take action in any of the plausible ways described above? Part of the problem was a lack of suitable constitutional text justifying Supreme Court intervention.[158] The text of the United States Constitution and the Bill of Rights says much more about procedure than about substance. However, the Eighth Amendment contains several provisions specifically applicable to sentencing, yet the Warren Court made almost no use of these provisions, while at the same time building an elaborate constitutional structure on the similarly open-ended texts of the Fourth, Fifth, and Sixth Amendments.[159] Moreover, in later years more conservatively constituted Courts made (somewhat) greater use of the Eighth

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[155] *Cf.* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 207 (1970) (federal authorities may decline to prosecute where non-federal authorities can effectively prosecute and there is no substantial federal interest in further prosecution, or offense primarily affects state or local interests).

[156] EDMUND G. BROWN, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STATEMENT OF EDMUND G. BROWN, CHAIRMAN, SUBMITTING THE STUDY DRAFT FOR PUBLIC COMMENT xxi (1970); SCHWARTZ, *supra* note 154, at xxvi–xxvii.

[157] 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 119–20 (1970) (describing a "staggering array" of mens rea provisions; in Title 18 of the United States Code alone, there were seventy-eight different combinations of words describing prohibited mental states).

[158] Stuntz, *supra* note 1, at 72. Stuntz also suggests that lawyers and courts prefer to address procedural issues because they are more "legal" or "law-like," giving rise to "classic lawyers' arguments." *Id.* at 74, 76. But, it is not clear why decisions on the issues identified in Part III are any less "legal" than decisions about right to counsel, search and seizure, or interrogation techniques.

[159] *Id.* at 72.

Amendment, and also applied several other Bill of Rights provisions to criminal law, sentencing, and punitive damages.

Even if the relative dearth of textual bases helps to explain why the Warren Court did little to improve state criminal law, it explains nothing about why the Court did so little to improve federal law. In that area, of course, the Court is free to use its subconstitutional powers to interpret federal statutes and develop common law defenses. As I noted above, the federal law of crimes was in terrible shape at the end of the Warren Court era, and was probably already in terrible shape at the start of that era. The Warren Court could have at least marginally improved federal criminal law, thereby also encouraging state courts to make comparable ameliorations, but it did not. Yet in earlier and later years the Court, although less liberally inclined, did make some modest improvements in federal criminal law.

A broader question, but one beyond the scope of this article, is why the United States and state constitutional texts regulate procedure so much more than substance. Part of the explanation is historical—the state and federal constitutions were written in reaction to the particular abuses of seventeenth and eighteenth century English authorities that tended to involve the executive and judicial branches more than the legislature. But the pattern is not unique to the United States; the same imbalance between substance and procedure safeguards can be found in foreign, regional, and international human rights law.[160]

To the extent that constitutional text or other reasons made the Warren Court hesitant to actively engage issues of criminal law and sentencing, perhaps the Court reacted by redoubling its efforts to improve criminal procedure—if little can be done on the substantive rules, the next best solution may be to give defendants as many procedural rights as possible, to provide at least an indirect brake on the application of harsh criminal and sentencing laws. Or perhaps the Court was simply distracted by the mass of procedure cases—the liberal watch dog didn't bark because it had been given a big hunk of meat to chew on (Sherlock Holmes didn't consider that hypothesis).

However, the most likely explanation for the Warren Court's relative silence on criminal law and sentencing issues is that these just didn't seem like important problems at the time. Sentencing wasn't a concern because prison populations were falling throughout the 1960s,[161] actual imposition of the death penalty had almost died out by 1967,[162] and everyone still believed in the wisdom of "indeterminate"

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[160] *See* Richard S. Frase, *Comparative Perspectives on Sentencing Policy and Research*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 259, 279–80 (Michael Tonry & Richard Frase eds., 2001) (pointing to a substance-procedure "human rights gap" and arguing that "mere procedural guarantees are an inadequate safeguard against government oppression, at least in a system dominated by elected officials and mass media seemingly obsessed with issues of crime"; also noting that severe penalties undermine procedural guarantees by coercing defendants to waive these safeguards to avoid the harshest penalties).

[161] *See* HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 78 fig.3.3 (2003).

[162] ZIMRING & HAWKINS, *supra* note 28, at 35.

sentencing, under which judges and parole boards had, and were trusted to use wisely, broad discretion to decide which offenders to put behind bars, and for how long. Lengthy prison terms were also less problematic because there were few severe mandatory minimum penalties and most offenders were released long before the expiration of their prison terms.[163] The indeterminate sentencing model also reduced practical concerns about the fairness and rationality of substantive criminal law rules—fine-grading of criminal liability didn't make much practical difference for many offenders.

The Warren Court's concern about state and federal criminal law rules may have been further diminished by recent or ongoing comprehensive criminal law reform projects. The Model Penal Code was completed in 1962, and the National Commission on Reform of Federal Criminal Laws (Brown Commission) began work in late 1966. Notwithstanding the serious deficiencies of state and especially federal criminal laws, the Warren Court may have thought it appropriate to defer to the criminal law reform experts, or at least give those projects time to do their studies and seek to put their recommendations into practice.[164]

Finally, the Warren Court's reluctance to reign in federal criminal jurisdiction and criminal law may have reflected a continuing, New-Deal-era belief in the benign intent and effects of federal programs. The Civil Rights revolution and the beginnings of the war on organized crime seemed to require broad federal power to protect minorities and protesters, fight powerful gangs, and combat corrupt local governments. This pro-federal-government mentality was still alive and well at the end of the Warren Court era. The Brown Commission's study draft, released in 1970, proposed a new federal criminal code organized like a state code, and in many ways as broad as a state code; the issue of federal jurisdiction would be "treated separately as the policy technical question it is."[165] Federal jurisdiction was further extended by the so-called "piggy-back" provision, allowing any offense to be federally prosecutable if committed in the course of another federal offense.[166] Another provision authorized, but did not require, federal authorities to decline prosecution under certain circumstances.[167] Viewed from the perspective of the Brown Commission report, overbroad federal criminal laws may have seemed unproblematic, or even desirable.

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[163] The uncertainty of parole release also made it difficult to attack lengthy prison terms "on the front end"—an inmate might have to serve an excessive sentence before he could challenge it. *See* Frase, *supra* note 14, at 635.

[164] However, in the procedural context the Warren Court chose not to defer to ongoing law reform projects. *See* Miranda v. Arizona, 384 U.S. 436, 523–24 (1966) (Harlan, J., dissenting) (arguing that the Court should have deferred to criminal justice projects being conducted by the American Bar Association, the American Law Institute, and the President's Crime Commission).

[165] BROWN, *supra* note 156, at xxi.

[166] SCHWARTZ, *supra* note 154, at xxx.

[167] NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 155, at § 207.

V. CONCLUSION—WHAT DIFFERENCE DID IT MAKE?

If, despite the actual or perceived barriers suggested above, the Warren Court had taken a more liberal, activist approach to issues of substantive criminal law and sentencing, would the Court have been successful? How might the law today be different, if the Court had tried to do more on the issues suggested in Part III? As a general matter, it seems likely that at least some (hypothetical, additional) liberal rulings on these issues would have survived the pruning and retrenchment efforts of subsequent, more conservative Courts. As has been true of most of the Warren Court's procedural rulings,[168] later Courts might have declined to extend a liberal criminal law or sentencing decision, but would have been reluctant to overrule it. Thus, at least some conservative decisions from the post-Warren Court era might have come out differently (or the cases might not have been accepted for review at all) if they had been preceded by a liberal ruling on the issue. On the other hand, it seems likely that some (hypothetical, additional) liberal rulings would have been ineffective or even counter-productive.

Efforts to place procedural and substantive limitations on the death penalty might be an example of the latter effect. When the Court reached these issues, beginning with *Furman v. Georgia* in 1972, its decision seemed to produce a backlash that may have actually revived support for the death penalty that had been in steady decline for several decades, with no executions between 1967 and 1972.[169] (Some have suggested that the Court's 1973 decision in *Roe v. Wade* did the same thing for the anti-abortion movement.) Would the backlash have been any weaker if *Furman*'s procedural limitations, and/or *Coker*'s substantive limit, had been adopted by the Warren Court? Reaction to the Court's rulings depends on the general political mood and trend of the times; perhaps public support for the Court's efforts to limit the death penalty would have been stronger in the early 1960s than it was in the early 1970s. But there is little reason to think the aftermath of *Furman* would have been much different if that case had been decided during the late Warren Court era. By 1968, many politicians, including soon-to-be president Nixon, were promoting a strong law-and-order agenda that the public increasingly supported. From that point on it seems unlikely that *Furman* could have withstood the backlash.

In contrast, if the Warren Court had decided a case like *Solem v. Helm*, there is good reason to believe not only that the Court would have reached the same conclusion as the 1983 Court actually did (a sentence of life without parole for a repeat small-time property offender violates the Cruel and Unusual Punishment Clause), but also that an earlier liberal decision in this case would have greatly altered the development of the law in this and related areas.

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[168] *See, e.g.*, Dickerson v. United States, 530 U.S. 428 (2000) (declining to overrule *Miranda*).

[169] *See* ZIMRING & HAWKINS, *supra* note 28, at 30, 38 (describing pre-*Furman* decline and post-*Furman* "backlash"); *see also* Benjamin Wittes, *The Executioner's Swan Song?*, ATLANTIC MONTHLY, Oct. 2005, *available at* http://www.theatlantic.com/doc/200510 (noting that the *Furman* decision "intensified public commitment" to the death penalty).

Indeed, even if the Warren Court had been faced with the less compelling facts of the first modern "three strikes" case, *Rummel v. Estelle*[170] (life with parole release "in as little as twelve years"), the liberal Warren Court, drawing on its decisions in *Trop v. Dulles* and *Robinson v. California*, might have been willing to find an Eighth Amendment violation even though the actual Court that heard the case rejected Rummel's claim. If the Warren Court had decided a case like *Rummel* or *Solem*, the legal momentum would have favored a liberal approach (just as the momentum shifted against meaningful Eighth Amendment review of prison terms after the Court's initial adverse ruling in *Rummel*). Moreover, if the Court had begun to develop proportionality limits under the Cruel and Unusual Punishment Clause, proportionality arguments could have more easily been made under the Excessive Fines Clause, and perhaps in some other contexts.[171] If the Warren Court had begun with a case like *Rummel* or *Solem*, it might then have been possible to impose Eighth Amendment limits on the death penalty without incurring the backlash problem noted above.

The Warren Court also might have been successful if it had sought to develop some sort of constitutional minimum-culpability doctrine. As was suggested in Part III, there was good support for this project in many of the Court's cases (*Lambert*, *Robinson*, vagueness cases, other fair-notice cases). And subsequent, more conservative Courts were surprisingly willing to read culpability requirements into federal statutes (at least for white collar offenders). The Court's first two efforts in this direction, *Lambert* and *Robinson*, went nowhere; but if the Court had found a way to tie these cases together (it would have helped if they had both been decided under the same amendment), and had related them to the other lines of cases mentioned above, a culpability-doctrine critical mass might have been achieved.

If the Warren Court had formally recognized the constitutional status of the reasonable doubt standard, there is good reason to believe that the Court's subsequent presumptions and defendant-burden-of-proof decisions would have been more liberal, and the Court might have reached and decided the *Apprendi* issue much sooner (building on the Court's decision in *Specht*, 1967). Whether the *Apprendi* doctrine itself would look different is harder to say (especially since that doctrine is still taking shape).

As noted in Part IV, the Warren Court was probably sympathetic to many forms of federal government intervention, and thus would not have been likely to slow or reverse the steady expansion of federal criminal jurisdiction and federal criminal laws. And even if it had tried to do so, Congress probably would often have responded with amended statutes asserting new bases for jurisdiction or clearly stating legislative

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[170] 445 U.S. 263, 280 (1980).

[171] *See* Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 389–94 (2002) (discussing *Tennessee v. Garner*, 471 U.S. 1 (1985), *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and other cases illustrating the Court's implicit but poorly developed Fourth Amendment proportionality principles). *See generally*, Frase, *supra* note 14 (discussing proportionality principles found in many areas of U.S., foreign, and international law).

intent to impose broad liability.[172] Still, the Warren Court might have had an impact on the development of criminal law more generally if the Court had taken a greater interest in issues of substantive criminal law. Except for an occasional old case like *Morrissette*,[173] or a newer but idiosyncratic case like *Cheek v. United States*,[174] it is surprising and disappointing to find so few examples of good criminal law opinions issued by our nation's highest Court.

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[172] *See, e.g., supra* notes 127 and 146 (discussing statutes seeking to overrule Court's decisions in *United States v. Lopez* and *Ratzlaff v. United States*).

[173] *See supra* notes 136–38 and accompanying text.

[174] *See supra* notes 147–48 and accompanying text.